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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1093

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (Pet. App. pp. 1a–7a) is reported at 340 F. 2d 100. The opinion and orders of the Federal Power Commission (J.A. 241–250, 259–260)[1] are reported at 30 FPC 1477 and 31 FPC 241.

JURISDICTION

The judgment of the court of appeals affirming the Commission order was entered on December 30, 1964 (Pet. App. p. 7a). A timely petition for rehearing was denied on February 11, 1965. The petition for a

[1] "J.A." refers to the joint appendix below.

writ of certiorari was filed on April 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Commission reasonably concluded that the construction and operation of certain facilities by petitioner were without the authorization required by Section 7 of the Natural Gas Act.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in the Appendix to the petition at pages 13a–14a.

STATEMENT

The court below affirmed a Commission order that (1) found that Tennessee Gas Transmission Company had constructed and was operating certain facilities for the transportation and sale of natural gas in interstate commerce without requisite Commission authorization under Section 7 of the Natural Gas Act and (2) required Tennessee to take steps to bring itself into compliance with the Act. In reaching this conclusion, the Commission held specifically that a so-called "budget-type" certificate of public convenience and necessity that it had previously issued to Tennessee did not, contrary to the company's claim, authorize Tennessee's facilities to transport gas from the Bastian Bay Field to its main transmission line.

The certificate on which Tennessee relied had been issued on a so-called "budget-type application" for

the year 1961. Such an application, as contemplated by Commission Order No. 185,[2] is one designed to secure certificate authorization for construction of a minor and routine kind, with respect to which it is [redacted] cation is processed under a shortened procedure and normally results in a relatively prompt issuance of a certificate.

Tennessee's budget-type application was received by the Commission on October 4, 1960 (Pet. App. p. 2a). Its declared purpose was to "relieve Applicant of the time and expense of preparing numerous relatively minor certificate applications, and the Commission and its Staff of the burden of processing such routine applications." It purported to be "consistent with the policy declaration of the Commission contained in its Order No. 185" (J.A. 177–178). The Commission published notice of the application, stating that Tennessee was requesting budget-type authorization for facilities to enable it "to take into its certificated main transmission pipeline system natural gas which will be purchased from time to time during" 1961, that a hearing thereon would be held on December 27, 1960, and that protest or petitions to intervene could be filed on or before December 19, 1960 (J.A. 185). On December 27, there having been no opposition or petition to intervene, staff counsel requested omission of the intermediate decision procedure (J.A. 186). Ten days later, on January 6, 1961, without

[2] 21 Fed. Reg. 1485. That order, explaining the budget-type certificate application, is discussed, *infra*, pp. 7–8.

further hearing, the Commission issued a budget-type certificate authorizing Tennessee "to construct and operate the proposed facilities to take natural gas from producers" (J.A. 186–188, 25 FPC 129). The budget authorization permitted a total expenditure of not more than $5,000,000 for the construction of gas purchase facilities with the added limitation of $500,000 upon the total cost of a single facility (Pet. App. p. 2a).

Purportedly in reliance on this certificate, Tennessee installed, at a cost of about $288,000, a 2.63 mile pipeline for the transmission to its interstate system of natural gas from reserves totalling approximately 750 billion cubic feet under leaseholds in the Bastian Bay Field in Louisiana, purchased from Pan American Petroleum Corporation for approximately $160,000,000 (Pet. App. p. 2a).[3] Although negotiations had culminated in a "Lease Sale Agreement" on July 15, 1960 (J.A. 60), almost three months before Tennessee's budget-type application was made, that application gave no hint of the existence of this agree-

[3] While Tennessee and Pan American treated this leasehold transaction as non-jurisdictional, the Commission, in the opinion at issue here, held it to be a jurisdictional sale of natural gas. The United States Court of Appeals for the Tenth Circuit set aside that portion of the Commission's opinion. *Pan American Petroleum Corp.* v. *Federal Power Commission*, 339 F. 2d 694 (Pet. App. pp. 8a–12a), petition for certiorari pending, Nos. 1024 and 1025, this Term. The jurisdictional status of lease-sale agreements of this type is also presently before the Court in *United Gas Improvement Co.* v. *Continental Oil Co., et al.*, and *Federal Power Commission* v. *M. H. Marr, et al.*, Nos. 644 and 693, this Term, which are *sub judice*.

ment or that this huge block of gas was to be brought into Tennessee's system by the facilities to be certificated.

Having learned of the sale of the leases through news accounts, the Commission inquired of Tennessee by letter whether the accounts were true and, if so, by what authorization the facilities for transmission had been constructed and were being operated. Tennessee replied by letter that it had purchased the Bastian Bay Field leases and that deliveries of gas from that field were being taken into Tennessee's pipeline through facilities authorized by the certificate granted on its budget-type application (J.A. 194–195).

By order issued April 6, 1961, the Commission reopened the earlier proceedings for the purpose of determining (1) whether the January 6, 1961, budget-type authorization covered the facilities necessary to connect the Bastian Bay Field reserves to Tennessee's system and (2) the cost of making natural gas from such reserves available to the Tennessee system (J.A. 188–189).

At the conclusion of the hearings, the examiner found that the certificate did not cover the facilities, and that, therefore, they had been constructed and were being operated without Commission authorization (J.A. 226).

The Commission affirmed these findings and ordered Tennessee, within six months, to make necessary filings and to take steps to bring itself into compliance with the Natural Gas Act, particularly Sections 7(c) and 7(d) (J.A. 247). While denying Tennessee's appli-

cation for rehearing, the Commission stayed these requirements of the order until six months after the completion of court review proceedings (J.A. 260).

The court below, though setting aside that portion of the Commission's order finding the sale of the leases to be a jurisdictional sale of gas, affirmed the Commission's determination as to the scope of Tennessee's budget-type certificate and the requirement that Tennessee apply for a certificate, stating (Pet. App. pp. 5a–6a):

> * * * it is * * * apparent that Tennessee did not contemplate that the certificate would cover the Bastian Bay Field project because, although the transaction with Pan American was imminent, Tennessee stated in its application that it did "not know the quantity or location of the gas supply to be connected to Applicant's system as contemplated herein."
>
> We are not impressed with the emphasis that Tennessee places upon the admitted fact that its connecting facility was constructed in literal compliance with the monetary restrictions contained in the "budget-type" certificate. The fact that the proximity of Tennessee's main transmission line to the vast resources of the Bastian Bay Field allowed the pipeline to be built at a cost of $288,000 is a mere economic coincidence and does not unequivocally establish the construction as routine or minor in nature. The very term "budget-type" contemplates an anticipated projection of probable expenditures for routine maintenance and expansion of such minor impact upon price structure that a blanket advance approval, rather

than the delay and difficulty of standard administrative practice, is warranted. The acquisition and utilization of the Bastian Bay resources were neither routine nor minor in their impact, and the very magnitude of the event was properly considered by the Commission as a factor negativing the authority claimed under the "budget-type" certificate.

ARGUMENT

This case presents an essentially factual issue which was carefully considered by the court below. There is no conflict and the case has no general importance. Accordingly, there is no warrant for further review by this Court.

1. This case involves simply a determination of whether, in the particular circumstances, the budget-type certificate issued by the Commission to Tennessee for the year 1961 covered the connection of the Bastian Bay reserves to petitioner's main transmission facilities. The Commission and its hearing examiner held that it did not, and the court below properly affirmed.

The Commission's conclusion was the only one possible in view of the nature and purpose of a budget-type certificate. This type of certificate had its genesis in the Commission's Order No. 185, issued February 8, 1956, 15 FPC 793, 794,[4] in which the Commission discussed the problems of obtaining greater flexibility in dealing with rate filings and certificate applications, particularly with reference to the Act's requirements

[4] 21 F.R. 1485.

relating to "minor installations or changes in connection with the rendition of service to existing customers or markets." Noting that it had requested Congress's authority to exclude minor facilities from the Act's certification requirements, the Commission stated (15 FPC at 794):

> In the meantime and as a substitute, the Commission advises any interested natural-gas company subject to the Natural Gas Act that it may file under section 157.6 of the Rules a single certificate application covering in general outline along the lines of a budget estimate the proposed routine construction intended to be undertaken by it during the current or ensuing fiscal year, listing the facilities proposed, the estimated cost of each item, the capacity, purpose, and time of intended construction, customers affected by each facility proposed, effect of proposals upon gas supply and deliverability, rates, service, and other pertinent information. A hearing could then be held on such a proposal and a certificate issued in accordance with the general application. At the end of the period, a statement shall be filed showing the actions taken under the certificate and any authority thereunder which was not exercised.

Tennessee's application expressly stated that it was consistent with this policy declaration and was intended to "relieve Applicant of the time and expense of preparing numerous relatively minor certificate applications, and the Commission and its Staff of the burden of processing such routine applications" (J.A. 177–178). A certificate issued in response to such an application may not reasonably be construed as

authority for construction of facilities attaching more than 750,000,000 Mcf of reserves acquired at a cost of about $160,000,000 in a transaction that had not previously been approved by the Commission.

At the time of its certificate application, petitioner was well aware that under this Court's holding in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, the Commission has an obligation carefully to scrutinize the cost of a new gas supply before permitting it to be attached to an interstate pipeline for transportation or resale in interstate commerce. It was aware, too, that in issuing budget-type certificates the Commission was not acting in contravention of this obligation; indeed, the purpose of budget certificates was, and is, to make unnecessary multiple applications for the construction of minor or routine facilities where the only public convenience and necessity question relates to the facilities themselves, rather than to the propriety of the purchase. Thus, *after* the Commission has certificated a producer sale to a pipeline, approval of pipeline construction of a small connecting facility is routine, even though the reserves are substantial, as in the two instances referred to by petitioner (Pet. p. 13). For in such situations the economic impact of the attachment of the new reserves is fully explored in passing on the producer's certificate application. But this is plainly not the case where the Commission has never been afforded an opportunity to examine the price of the reserves or the effect of the transaction on the consuming public.

If, as Tennessee and Pan American (the seller of the reserves) were contending, the transaction was not a sale by a producer, it was clear that the acquisition would have been subject to Commission scrutiny in passing on Tennessee's application for a certificate for the connecting facility. See, *e.g.*, *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143 (C.A.D.C.). In the absence of prior approval of a producer sale, Tennessee's claim that the certificate for its connecting facility was routine is plainly unsupportable.[8] As the Tenth Circuit said (Pet. App. 3a):

> * * * We think it almost self-evident that the ruling and order of the Commission in such regard are manifestly correct and proper when projected against the over-all purpose of the Natural Gas Act and the policy, purpose and procedure pertaining to the issuance of "budget-type" certificates.

Petitioner's claim that its Bastian Bay facilities were covered by the budget-type certificate is also surprising in view of the statement in its certificate application that it did "not know the quantity or location of the gas supply to be connected to Applicant's sys-

[8] If, contrary to our position in No. 1024, this Court were to accept Tennessee's view that its facilities to Bastian Bay were attaching its own reserves, the budget-type certificate relied upon would not have constituted Commission authorization for their construction and authorization for the additional reason that the certificate by its terms covered only facilities used "to take natural gas from producers" (J.A. 187). As the Commission held (J.A. 243) "[i]t is clear that the term 'producer' as used in the order did not include Tennessee as a producer of its own reserves."

tem as contemplated herein" (J.A. 178). For its application was executed on September 30, 1960, nearly three months after the lease sale agreement for the Bastian Bay reserves had been signed by Tennessee and Pan American (J.A. 60, 176–180). In these circumstances, it is apparent as the court below held (Pet. App. p. 5a);

> * * * that Tennessee did not contemplate that the certificate would cover the Bastian Bay Field project * * *. [*]

2. Petitioner's contention (Pet. p. 14) that the Commission, without statutory authority, revoked a license previously granted is also without substance. As the court below succinctly stated (Pet. App. pp. 6a–7a):

> * * * the Commission did not purport to alter or revoke Tennessee's certificate but merely to determine whether the pipeline construction was authorized by the order and certificate as granted.

3. Petitioner's claim that its petition raises questions of general importance is without foundation; as we have shown, the issues turn on the particular circumstances. Moreover, assuming there was ever real doubt as to the scope of budget-type certificates, the Commission's regulations have been amended to codify the types of circumstances under which the budget-type certificates will be issued pursuant to the intent of Order No. 185 (27 FPC 1120, 27 Fed. Reg. 5606). Section

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[*] If, contrary to this interpretation, Tennessee had at all pertinent times contemplated construction of these connecting facilities pursuant to the budget authorization, its application would raise questions of good faith.

2.58 of the Commission's regulations, 18 C.F.R. (Cum. Supp. 1964) § 2.58, expressly restricts the applicability of pipeline gas purchase facilities budget-type certificates to facilities used to pick up gas from a seller whose sale has been certificated by the Commission.[7]

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1965.

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[7] If, as we have urged in No. 1024, pending on petition for certiorari, this Court concludes that the lease-sale agreement was a sale of natural gas subject to the Commission's jurisdiction, it would appear that this case would be of little practical importance even to petitioner. For in that situation, gas could not legally be transported from the Bastian Bay Field without Commission authorization for the sale of the gas. If that sale is authorized, Tennessee's connecting facilities would presumably also be certificated. If the sale is not authorized, Tennessee's connecting facilities could no longer be used, whether the budget-type certificate authorized their construction and operation or not.

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